No. 3–10–0668

Order filed May 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2011

SVETLANA HENDERSON,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit
Petitioner-Appellant,	)	Rock Island County, Illinois
	)	
v.	)	No. 10–OP–455
	)	
TERRY HENDERSON,	)	Honorable
	)	Frank R. Fuhr
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgement.

ORDER

Held: The trial court properly denied petitioner's request for an order of protection because petitioner failed to present any evidence that respondent committed acts of abuse as defined in the Illinois Domestic Violence Act of 1986.

Petitioner filed a verified petition for order of protection on July 26, 2010. The court granted judgment in favor of respondent at the close of petitioner's case in chief and denied petitioner's verified petition for order of protection. Petitioner filed a notice of appeal on August 30, 2010. We affirm.

FACTS

On July 26, 2010, petitioner filed a verified petition for order of protection against respondent. According to the petition, petitioner sought an order of protection on behalf of herself and her 14-year old daughter, Anna Henderson (Anna). Also according to the petition, petitioner and respondent were previously married and the court entered a judgment of dissolution of marriage in Rock Island County case No. 98–D–613.

Petitioner claimed respondent had visitation with the couple's daughter, Anna, on July 10 and July 11, 2010. During Anna's visit with her father, Anna discovered the face of her cellular telephone was smashed. Anna took her cellular telephone to Best Buy for service, and the technicians at the store told her that someone smashed the screen. The petition alleged that Anna denied smashing the screen to her telephone, and since Anna and respondent were the only persons present at respondent's apartment that weekend, petitioner claimed respondent smashed his daughter's cellular telephone so that she could not contact petitioner during the visitation. Petitioner also claimed that respondent goes through Anna's purse and her belongings.

The second incident occurred on July 24, 2010, during another scheduled visitation with Anna and claimed that respondent accused Anna of stealing gold coins from his bedroom and called his daughter a thief. Petitioner stated that it was dangerous for Anna to visit her father because he "can even place gold coins in her purse, or pockets and represent them as an evidence." Consequently, petitioner requested the court to grant an order of protection on behalf of Anna.

On July 26, 2010, petitioner and Anna appeared *ex parte* before the court. According to the minute entry of that date, the court noted that Anna's next visitation was not until August 7,

2010. The court scheduled a hearing for August 6, 2010. On August 6, 2010, petitioner and Anna appeared *pro se* and respondent appeared by counsel. The court temporarily suspended respondent's visitation with Anna pending a hearing on petitioner's verified petition for order of protection on August 20, 2010.

On August 20, 2010, petitioner and Anna appeared *pro se*, and respondent appeared with counsel. After a preliminary discussion between the court, the petitioner and counsel for the respondent regarding visitation, the court stated "[i]f she [petitioner] wants to proceed in this way, I'll let her put on testimony, and we'll see what she can produce." The court then directed petitioner to proceed with her evidence.

Petitioner called Anna Henderson as her first witness who testified that on Saturday, July 10, 2010, she charged her cellular telephone, put it in her purse, and took it with her to visitation with her father. On Sunday, July 11, 2010, she removed her telephone from her purse and found the "screen was smashed with this clear marking of a fingerprint." She testified that she did not smash the telephone but indicated that during the visitation, respondent was "freaking out, yelling" about turning off the telephone because he did not like her to use the phone during visitation.

Anna also testified that during another visit on July 24, 2010, respondent began talking about some of his gold coins missing and accused Anna of being a thief which shocked and surprised Anna. Anna told the court that she had never seen the gold coins in respondent's apartment. When asked why she believed that respondent accused her of stealing, she stated "[p]urely blackmail." She believed that respondent wanted her "to stop talking about the broken cell phone and clear his case up." When asked if she wanted to go to respondent's apartment,

she stated "no, because he could easily slip gold coins or anything valuable in my pockets or anything."

Anna testified that she believed that respondent was going through her things during her visits because on one occasion, respondent asked her why she did not bring a book with her. Anna stated that respondent could have only known she had not packed a book by going through her luggage.

Anna told the court she wanted the court to suspend her overnight visitations with respondent because she did not feel safe with someone "who would like blackmail me, who would accuse me of theft and would look through my belongings and all that stuff. And I don't want to be anywhere near that apartment." When questioned regarding potential blackmail, Anna explained that respondent threatened her with "telling my mom."

Petitioner testified that before visitation on July 10, 2010, Anna's telephone was in working order, but when Anna returned from visitation on July 11, 2010, the screen was smashed by a finger. She told the court that she had the cellular telephone with her and wished to introduce it into evidence. She also told the court that she received an e-mail from respondent which stated "Anna afraid to tell me the truth regarding the phone – that's from his e-mail – and she's lying to me. So he was trying to raise my questions if she's telling the truth regarding the phone."

Petitioner said that Anna came home from her scheduled weekend visitation with respondent on July 24, 2010, after only one and one-half hours. She stated that Anna was very upset because respondent accused Anna of stealing some of his gold coins. She told respondent that they were going to court. Petitioner testified that respondent wanted "to make a balance of

accusations from smashed phone to the gold coins." On Monday, July 26, 2010, petitioner explained that she came to the court for an order of protection because she did not know "how else can I prevent overnight visitations."

Petitioner told the court that on August 7 or 8, 2010, respondent sent her an e-mail stating that he must have misplaced his gold coins and stated that he should not have jumped to conclusions that Anna was responsible. Respondent apologized. She asked the court to accept respondent's e-mails as evidence.

At the conclusion of petitioner's testimony, respondent's counsel requested the court to dismiss the order of protection because petitioner had failed to meet her burden. The court advised petitioner that counsel was making a motion for a directed verdict based on the fact that there are not any allegations that respondent committed acts that would be defined as abuse or harassment. In response, to counsel's request, petitioner argued that calling Anna a liar was harassment and that respondent was intimidating Anna.

The court then said:

> "What has happened is unfortunate. Okay? And it appears from the e-mail that your ex-husband actually apologized. It's – what he did is not abuse under the definition of the Domestic Abuse Act. Okay? If you want to modify the visitation that's in the divorce decree, you need to file a petition to modify in the divorce action and set it up for a settlement conference at nine o'clock, notify Ms. Coyle or your ex, and then schedule it for a hearing. But I'm going to deny your motion for a plenary order of protection at this time."

Petitioner asked the court to suspend overnight visitations. The court denied the request. On August 30, 2010, plaintiff filed a notice of appeal.

ANALYSIS

On appeal, petitioner asks this court to reverse the decision of the trial court denying petitioner's verified petition for order of protection and remand the cause to the trial court for a new hearing. Petitioner claims that the trial court "broke" the adversary process by not calling respondent to testify, that the trial court abused its discretion by refusing to admit respondent's e-mails as evidence in this case, that the trial court ignored the testimony of the witnesses regarding "the harassment, verbal abuse, blackmail, intimidation and interference with privacy and personal freedom of Anna Henderson," that the trial court tried to re-qualify the case from an order of protection to a modification of visitation, and that the trial court's decision was against the manifest weight of the evidence.

First, we address our standard of review in this case. Respondent's counsel requested judgment in respondent's favor at the close of petitioner's case. This request is procedurally allowed pursuant to section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2008)). In this case, the trial court allowed the request and entered a judgment in favor of respondent at the conclusion of petitioner's evidence.

A trial court may properly allow a motion for a judgment in respondent's favor at the close of petitioner's case, either when a petitioner failed to present at least some evidence on each element of the *prima facie* case, or the petitioner failed to carry the ultimate burden of proof. *Matter of Estate of Etherton*, 284 Ill. App. 3d 64, 68 (1996). Our supreme court has explained that granting judgment due to the lack of a *prima facie* case means that a petitioner

"has not presented at least some evidence on every element essential to his cause of action," and therefore, respondent is entitled to judgment in his favor as a matter of law. *Kokinis v. Kotrich*, 81 Ill. 2d 151, 154-55 (1980). When a trial court grants the motion based upon a total lack of evidence on one or more of the elements of the case, we review *de novo*. *Kokinis v. Kokinis*, 81 Ill. 2d at 155; *Woods v. Cole*, 181 Ill. 2d 512, 516 (1998); *Barnes v. Michalski*, 399 Ill. App. 3d 254, 264 (2010); *Minch v. George*, 395 Ill. App. 3d 390, 397 (2009).

In this case, after considering petitioner's evidence, the trial court found that "what he [respondent] did is not abuse under the definition of the Domestic Abuse Act." We agree.

The Illinois Domestic Violence Act of 1986 (750 ILCS 60/101 *et seq.* (West 2008)) (Act) defines "Abuse" to specifically mean "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or wilful deprivation" but does not include reasonable direction of a child by a parent. 750 ILCS 60/103(1) (West 2008). The evidence in this case demonstrates that respondent purportedly discouraged his daughter from using her cellular telephone during scheduled visitations and also inspected her luggage and other belongings during visitation. As a parent, based on the facts contained in this record, those acts would constitute parental direction and do not rise to the level of either abuse, harassment, intimidation of a dependent or interference with person liberty. The fact that one parent may report the conduct of a child to another parent certainly does not rise to the level of parental "blackmail."

As to petitioner's allegations of harassment, intimidation, and interference with personal freedom of Anna Henderson," the Act specifically defines these terms. For example, the Act defines "harassment" as knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and

does cause emotional distress to the person. 750 ILCS 60/103(7) (West 2008) "Intimidation of a dependent" means subjecting a person who is dependent because of age to participation in or the witnessing of physical force or restraint against another. 750 ILCS 60/103(10) (West 2008). "Interference with personal liberty" means committing or threatening physical abuse, harassment, intimidation or willful deprivation so as to compel another to engage in conduct from which she or he has a right to abstain or to refrain from conduct in which she or he has a right to engage. 750 ILCS 60/103(9) (West 2008).

Petitioner did not offer any evidence to establish respondent harassed, intimidated, or interfered with his daughter's personal liberty as defined by the Act. As the trial court judiciously explained to petitioner in this case, petitioner did not offer any evidence to support the allegation that respondent intentionally damaged Anna's telephone. Although Anna discovered her telephone was damaged when she removed it from her purse on July 11, 2010, there was not evidence, direct or circumstantial, linking the damage to respondent. Although petitioner claims that respondent harassed Anna by calling her a thief, respondent made that statement in response to his belief that Anna had stolen gold coins from his bedroom during a visitation. When respondent discovered his error, he apologized. We conclude this conduct did not establish harassment within the meaning of the Act.

Accordingly, we also conclude that the trial court correctly found that petitioner did not offer any evidence which *prima facie* established acts of abuse within the meaning of the Act and correctly granted judgment for respondent. Moreover, it is well established that obtaining an order of protection is not the proper procedure for resolving visitation issues. *Radke v. Radke*, 349 Ill. App. 3d 264, 269 (2004); *Wilson v. Jackson*, 312 Ill. App.3d 1156, 1164-65 (2000)

(citing *In re Marriage of Gordon,* 233 Ill. App. 3d 617 (1992)).

Next, we turn to petitioner's claims that the adversary process failed because respondent did not testify and that the court re-classified the hearing as a petition to modify visitation. As previously discussed, the trial court granted judgment in this case based upon a trial procedure enacted by our legislators. Accordingly, respondent was not required to testify in this case. See 735 ILCS 5/2-1110 (West 2008).

Although the trial court initially inquired about the dissolution proceedings, as well as visitation, it is clear from the record that the trial court allowed petitioner to proceed on her verified petition for order of protection. The court stated "[i]f she [petitioner] wants to proceed in this way, I'll let her put on testimony, and we'll see what she can produce." Further when ruling in this case, the trial court specifically addressed the "Domestic Abuse Act." Based upon this record, it is clear that the trial court did not reclassify this hearing as a modification of visitation as petitioner claims.

We next turn to petitioner's last argument that the trial court abused its discretion by refusing to admit respondent's e-mails as evidence in this case. Our review of the record shows the trial court considered the contents of the e-mails by stating, "And it appears from the e-mail that your ex-husband actually apologized." Therefore, even though the court may not have announced the e-mail correspondence had been admitted into evidence and would be considered by the court, it is clear from the record that the court did consider this evidence.

Respondent has requested attorney fees but does not direct this court to any authority or statutory provision authorizing this court to award attorney fees in this appeal. Therefore, that request is denied.

CONCLUSION

The judgment of the circuit court of Rock Island County is affirmed.

Affirmed.